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CAFTA-DR LABOR PROVISIONS: WHY THEY FAIL WORKERS AND PROVIDE DANGEROUS PRECEDENT FOR THE FTAA

*Brandie Ballard Wade**

I. INTRODUCTION

THE Dominican Republic–Central American–United States Free Trade Agreement (CAFTA-DR) is an agreement promoting free trade between the United States and six Central American countries.¹ Within the body of this agreement, the signatory parties linked the capability to trade with international labor rights, providing procedures in the event that one of the parties fails to meet its obligations under the labor provisions.² This concept of linking trade with labor standards in free trade agreements developed in United States' negotiations within the last decade; however, as this paper will show, the labor rights provisions in free trade agreements, specifically CAFTA-DR, fall tragically short of international standards and fail to produce any meaningful changes or consequences.³

Trade itself has existed since the prehistoric era, and is typically thought of as the exchange of goods, services, or both by sale, gift, or barter.⁴ Trade between distant lands is the basis upon which kingdoms and nations were built, creating civilizations of great wealth and power throughout history.⁵ The concept of free trade, the flow of goods and services without restrictions between countries, was promoted as early as the seventeenth century with Holland at the center of free trade.⁶ The

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1. Marisa Anne Pagnattaro, *The "Helping Hand" in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT'L L. 845, 889 (2004) (discussing CAFTA).

2. See Briefing Paper, Human Rights Watch, Labor Rights and Trade: Guidance for the United States in Trade Accord Negotiations (Oct. 30, 2002), <http://hrw.org/press/2002/10/laborrights-bck.htm> [hereinafter Labor Rights and Trade].

3. See *id.*

4. Encyclopedia.com, Trade, <http://www.encyclopedia.com/doc/1E1-trade.html> (last visited Apr. 9, 2007) [hereinafter Trade].

5. See *id.*

6. *Id.*; Encyclopedia.com, Free Trade, <http://www.encyclopedia.com/doc/1E1-free-trad.html> (last visited Apr. 9, 2007) [hereinafter Free Trade].

nineteenth century saw the ascendancy of free trade, with other countries pursuing the development of open markets.⁷ By 1946, twenty-three countries signed onto the General Agreement on Tariffs and Trade (GATT), promoting free trade throughout the world.⁸

While the United States entered into limited free trade agreements during the mid-1900s, it did not enter into a comprehensive free trade agreement until the late 1980s. In 1987, the United States entered into a free trade agreement with Canada, eliminating a number of trade restrictions.⁹ But this agreement was superseded by the North American Free Trade Agreement (NAFTA), which went into effect January 1, 1994, between the United States, Canada, and Mexico.¹⁰ NAFTA provided for the elimination of duties on half of all goods shipped from the United States to Mexico and the phasing out of other tariffs over periods of five to fifteen years.¹¹

Additionally, in December 1994, thirty-four heads of state from the Americas, which included North America, South America, Central America, and the Caribbean Islands,¹² met at the First Summit of the Americas, agreeing to establish a Free Trade Area of the Americas (FTAA) by 2005.¹³ At the summit, the heads of state agreed "to achieve substantial progress toward building the FTAA by 2000."¹⁴ In April of 1998, formal negotiations for the FTAA were commenced at the Second Summit of the Americas with the participants agreeing that the "FTAA Agreement will be balanced, comprehensive, WTO-consistent, and will constitute a single undertaking."¹⁵

As part of the process of achieving an FTAA Agreement, the United States entered into CAFTA-DR with Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua on August 5, 2004.¹⁶ CAFTA-DR establishes a free trade area between the United

7. *See Trade, supra* note 4.

8. Roots of the WTO, A Brief History of GATT, <http://www.econ.iastate.edu/classes/econ355/choi/wtoroots.htm#History> (last visited May 30, 2006).

9. Government of Canada, 1989 – Canada-United States Free Trade Agreement: Eliminating Barriers to Trade, <http://canadianeconomy.gc.ca/english/economy/1989/economic.html> (last visited May 30, 2006) [hereinafter Canada-U.S. Free Trade Agreement].

10. *Id.*

11. *Id.*; Foreign Agricultural Service (FASonline), The North American Free Trade Agreement (NAFTA), <http://www.fas.usda.gov/itp/Policy/NAFTA/nafta.asp> (last visited Jan. 26, 2007) (hereinafter North American Free Trade Agreement).

12. Perry-Castañeda Library Map Collection, Map of the Americas, <http://www.lib.utexas.edu/maps/americas.html> (last visited Jan. 26, 2007).

13. Office of NAFTA and Inter-American Affairs (ONIA), Free Trade Area of the Americas, <http://www.mac.doc.gov/ftaa2005/index.html> (last visited Jan. 26, 2006).

14. Free Trade Area of the Americas, Antecedents of the FTAA Process, http://www.ftaa-alca.org/View_e.asp#PREPARATORY (last visited Jan. 26, 2007) [hereinafter Antecedents of the FTAA Process].

15. *Id.*

16. Washington Office on Latin America, U.S.-Central America Free Trade Agreement, <http://www.wola.org/economic/cafta.htm> (last visited Nov. 16, 2005); Barbara H. Garavaglia, *The Central American-Dominican Republic Free Trade Agreement: Sources of Information*, 84 MICH. B.J. 46, 46 (2005).

States and the six named Central American countries, providing for the elimination of tariffs and other barriers to trade.¹⁷ The legislatures of El Salvador, Guatemala, the Dominican Republic, Nicaragua, and Honduras have all approved CAFTA-DR, and it is pending in Costa Rica.¹⁸ But the agreement has to be “implemented in at least one of the other signatory countries” for it to go into effect.¹⁹

The focus of this comment will be on CAFTA-DR and whether its labor provisions are sufficient to ensure the protection of internationally recognized labor rights. Additionally, the labor provisions in the most recent draft of the FTAA Agreement will be examined in comparison to CAFTA-DR and previous free trade agreements with particular attention paid to the ramifications of using CAFTA-DR’s labor provisions as a blue print in the FTAA Agreement. Part II of this comment will focus on the history of free trade agreements within the Americas, including NAFTA, CAFTA-DR, the anticipated FTAA Agreement, and the connection between these three agreements. In Part III, the discussion will focus on CAFTA-DR’s labor provisions, comparing its labor provisions with those of other free trade agreements made by the United States. Part IV examines the drafted labor provisions of the FTAA explaining why these provisions must be modified before being grafted into the FTAA Agreement’s final draft.

II. HISTORY OF FREE TRADE AGREEMENTS IN THE AMERICAS

Trade agreements within the Americas began as early as 1854, when the British, acting on behalf of Canada, and the United States entered into the Canadian-American Reciprocity Treaty, affecting the trade of raw materials.²⁰ The United States agreed to eliminate the tariff on natural resource imports, such as wheat and timber, and Canada agreed to give the Americans fishing rights off of Canada’s east coast.²¹ The free trade agreement proved to be a great boon for the Canadian economy.²² Canada experienced rapid economic growth, with the country’s exports to the United States growing by 33 percent after the treaty took effect.²³ Unfortunately, the exports of the United States increased by only 7 percent, and in 1866, the Americans ended the treaty, believing that Canada

17. Washington Office on Latin America, *supra* note 16.

18. James T. Berger, *CAFTA: A Fast-Track Success Story*, AREA DEV. SITE & FACILITY PLAN., Jan. 1, 2006, at 46, available at 2006 WLNR 47302; Export.gov, U.S.-CAFTA-DR Free Trade Agreement: How Can U.S. Companies Benefit, <http://www.export.gov/fta/CAFTA/index.asp?dName=CAFTA> (last visited May 7, 2007).

19. Garavaglia, *supra* note 16, at 46.

20. D.C. Masters, *Reciprocity*, in 5 ENCYCLOPEDIA OF CANADA 228-230 (W. Stewart Wallace ed., University Associates of Canada 1948), <http://www2.marianopolis.edu/quebechistory/encyclopedia/ReciprocityCanada.htm>.

21. *Id.*

22. *See id.*

23. *Id.*

received the majority of the benefits.²⁴

But in January of 1989, Canada and the United States, entered again into a free trade agreement known as the Canadian-United States Free Trade Agreement.²⁵ Though the agreement did remove most remaining tariffs between the countries, the main focus of the agreement was on Canada gaining unimpeded access to the United States' economy.²⁶ But this agreement was expanded and modified with the implementation of NAFTA.²⁷

A. NORTH AMERICAN FREE TRADE AGREEMENT

On January 1, 1994, NAFTA entered into effect.²⁸ NAFTA is considered a treaty under international law; however, the United States classifies it as a congressional-executive agreement, requiring only a majority vote in both the U.S. House of Representatives and Senate.²⁹ NAFTA did include two additional agreements addressing environmental and labor issues.³⁰ Since the labor provisions were not included within the main body of NAFTA, their effectiveness and weight have been questioned.³¹

NAFTA immediately eliminated duties on half of all goods sent from the United States to Mexico, and it phased out additional tariffs over five to fifteen year periods.³² All non-tariff agricultural trade barriers between the United States and Mexico were removed, and all tariffs dealing with agricultural trade between the United States and Canada, with some exceptions, were to be removed by January 1, 1998.³³ Additionally, NAFTA presented investors with unique guarantees intended to stimulate foreign direct investment,³⁴ encourage relocation of factories and jobs, and promote deregulation and privatization of basic services, such as water and energy.³⁵ In promoting the agreement, promises were made that NAFTA would "create hundreds of thousands of new high-wage U.S. jobs, raise living standards in the U[nited] S[tates], Mexico, and Canada, improve environmental conditions and transform Mexico from a

24. Wikipedia.com, Canadian-American Reciprocity Treaty, http://en.wikipedia.org/wiki/Canadian-American_Reciprocity_Treaty (last visited May 30, 2006).

25. Vancouver Career College, The History of NAFTA – North American Free Trade Agreement, <http://www.vancol.com/history-of-nafta.cfm> (last visited Jan. 30, 2006).

26. Canada-U.S. Free Trade Agreement, *supra* note 9.

27. *Id.*

28. *Id.*

29. Canadian Democratic Movement—Encyclopedia, NAFTA, http://www.canadiandemocraticmovement.ca/module-pnEncyclopedia-display_term-id-16-vid-1.html (last visited May 31, 2006).

30. Vancouver Career College, *supra* note 25.

31. Briefing Paper, Robert E. Scott, The High Price of 'Free' Trade: NAFTA's Failure to Has Cost the United States Jobs Across the Nation, Econ. Policy Inst., Nov. 17, 2003, at 1, http://www.epinet.org/content.cfm/briefingpapers_bp147.

32. North American Free Trade Agreement, *supra* note 11.

33. *Id.*

34. Scott, *supra* note 31, at 1.

35. Public Citizen, North American Free Trade Agreement (NAFTA), <http://www.citizen.org/trade/nafta/> (last visited Jan. 30, 2006).

poor developing country into a booming new market for U.S. exports.”³⁶

Under NAFTA, U.S. domestic exports to Canada and Mexico increased significantly, with real growth being 41 percent to Canada and 95.2 percent to Mexico.³⁷ These figures appear encouraging, especially in light of the fact that between 1994 and 2000 total employment rose swiftly in the United States, resulting in a drop in overall unemployment.³⁸ But the net export between the United States, Mexico, and Canada rose from \$30 billion in 1993, to \$80 billion dollars in 2002, which is a 281 percent increase.³⁹ Further, all fifty states and the District of Columbia suffered a net loss of jobs because “many more jobs are lost due to growing imports than are gained by increasing exports.”⁴⁰ Employees working in industries most affected by trade deficits and capital flight face continued threats by their employers to close all or part of the company’s operations in the United States and move to another country, usually Mexico.⁴¹

In Mexico, fewer workers now hold regular jobs in paying positions and real wages have plummeted sharply since the implementation of NAFTA.⁴² Migration by Mexicans seeking work in the United States has more than doubled under NAFTA due to the Mexican economy failing to create enough positions for its workers.⁴³ The Mexican government approximated that more than half of the population makes less than the amount necessary to cover basic needs such as food, housing, and health care.⁴⁴

B. FREE TRADE AREA OF THE AMERICAS

U.S. President George H. Bush first expressed the concept of free trade throughout the American hemisphere in 1990, announcing the Enterprise for the Americas Initiative (EAI).⁴⁵ The program’s goal was to spread free trade from “Anchorage to Tierra del Fuego,” to increase investment, and to supply “a measure of debt relief” for states in the Caribbean and Latin America.⁴⁶ The EAI included negotiating a series of free trade

36. *Id.*

37. Scott, *supra* note 31, at 3.

38. *Id.*

39. *Id.*

40. *Id.* at 8.

41. *Id.* at 9-10.

42. *Id.* at 10.

43. Public Citizen, *The Ten Year Track Record of the North American Free Trade Agreement: The Mexican Economy, Agriculture and Environment*, in NAFTA AT TEN SERIES, at 1 (Feb. 2, 2005), http://www.citizen.org/documents/NAFTA_10_mexico.pdf.

44. *Id.* at 2.

45. Donald B. Harrington, *Enterprise for the Americas Initiative (EAI)*, NATIONAL WAR COLLECTION MUSEUM ESSAY 92-40 (Jan. 1, 1992), <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA440444&Location=Us&doc=GetTRDoc.pdf> [hereinafter *EAI*].

46. Hannah Holm, *Enterprise of the America Initiative: An Analysis July '93* (July 1993) (Economic Democracy Information Network Project, Center for Community Economic Research, Berkeley University) <http://www.nathannewman.org/EDIN/.trade/EAI.html>.

agreements, starting with NAFTA, as a means to achieving hemispheric free trade.⁴⁷ NAFTA came into force in January of 1994,⁴⁸ and in December of 1994, the heads of state from thirty-four countries in the Americas met to discuss developing a plan for hemispheric free trade.⁴⁹

In early December 1994, thirty-four heads of state and government of the Americas came together in Miami, Florida at the First Summit of the Americas in an effort to construct an agreement through which the economies of the Americas might be united into a single free trade area.⁵⁰ They agreed to create the FTAA "in which barriers to trade and investment will be progressively eliminated."⁵¹ From the First Summit of the Americas, the heads of state drafted a Declaration of Principles stating that "the Americas are united in pursuing prosperity through open markets, hemispheric integration, and sustainable development."⁵² The declaration included discussion on preserving and strengthening democracy in the Americas, promoting prosperity through free trade, eliminating poverty and discrimination, and efforts to conserve the environment.⁵³ Additionally, the declaration states a commitment to conclude negotiations on the FTAA by 2005, with concrete progress toward this goal to be made before the year 2000.⁵⁴ Although the FTAA has yet to be finalized, when it is, it will be the "largest free trade agreement in history, with an expected combined G[ross] D[omestic] P[roduct] of over \$9 trillion, and a market of some 765 million people."⁵⁵

C. DOMINICAN REPUBLIC-CENTRAL AMERICAN-UNITED STATES FREE TRADE AGREEMENT

Negotiations for the Central American Free Trade Agreement (CAFTA) between the United States, El Salvador, Guatemala, Honduras, and Nicaragua began in January of 2003.⁵⁶ On December 17, 2003, the parties completed negotiations for CAFTA.⁵⁷ Costa Rica, which had taken part in the negotiations, announced in January of 2004 that it would join CAFTA, followed by the Dominican Republic in March.⁵⁸ The legislation implementing the CAFTA-DR passed in the U.S. House and Sen-

47. *Id.*

48. North American Free Trade Agreement, *supra* note 11.

49. Antecedents of the FTAA Process, *supra* note 14.

50. *Id.*

51. First Summit of the Americas: Declaration of Principles, Dec. 9-11, 1994, <http://www.summit-americas.org/miamidec.htm>.

52. *Id.*

53. *Id.*

54. *Id.*

55. Summits of the Americas Information Network, First Summit of the Americas: Free Trade Area of the Americas (FTAA), [http://www.summit-americas.org/Miami%20Summit/FTAA-English\(rev\).htm](http://www.summit-americas.org/Miami%20Summit/FTAA-English(rev).htm) (last visited Feb. 1, 2006) [hereinafter Summits of the Americas].

56. *Adoption of Central American Free Trade Agreement*, 98 AM. J. INT'L L. 350, 350 (Sean D. Murphy, ed., 2004) [hereinafter *Adoption of Central American*] (explaining negotiations process for original CAFTA agreement).

57. *Id.*

58. *Id.*

ate in July 2005, with President George W. Bush signing CAFTA-DR on August 2, 2005.⁵⁹

CAFTA-DR was modeled after NAFTA and is generally considered to be another step towards the realization of a FTAA.⁶⁰ The overall purpose of CAFTA-DR is to allow free trade between the signatory countries through the elimination of tariffs and other trade barriers.⁶¹ Up until CAFTA-DR, over 99 percent of exports from Central America came into the United States duty-free; however, the tariffs placed on U.S. exports by the six Central American countries ranged from 35 percent in Honduras up to 60 percent in Nicaragua.⁶² Therefore, through the negotiations the United States sought to and did turn this “one-way-street” of duty-free access’ into a “two-way-street,” giving U.S. exporters a level playing field.⁶³ But the total two-way trade amounts to only thirty-two billion dollars per year, which is very small compared to America’s eleven trillion dollar economy.⁶⁴ Further, the World Bank, in a report done at the request of the United States and the six Central American countries, warned that CAFTA-DR “is unlikely to lead to substantial economic development,”⁶⁵ which was one of the key selling points for CAFTA-DR by the Bush administration.⁶⁶ The World Bank predicted that the six Central American countries’ economies would grow no greater than 0.8 percent more per year within CAFTA-DR’s first five years compared to the rate of growth without CAFTA-DR in place.⁶⁷

Despite the economic and security benefits touted by CAFTA-DR proponents, CAFTA-DR faced staunch opposition from sugar producers, as well as environmental, human rights, and labor rights organizations.⁶⁸ Sugar and beet producers argue that CAFTA-DR will allow such an overwhelming amount of sugar into the United States that the sugar industry

59. Garavaglia, *supra* note 16, at 46.

60. Washington Office on Latin America, *supra* note 16.

61. Garavaglia, *supra* note 16, at 46.

62. Foreign Agricultural Service (FASonline), Central American-Dominican Republic-United States Free Trade Agreement: Overall Agriculture Fact Sheet, www.fas.usda.gov/info/factsheets/CAFTA/overall021105a.html (last visited Nov. 16, 2005).

63. *Id.*

64. Warren Vieth, *House Oks CAFTA in Narrow Vote*, CINCINNATI-KY. POST, July 28, 2005, at A1, available at 2005 WLNR 12264992.

65. Elizabeth Becker, *A Push for a Central American Trade Pact*, N.Y. TIMES, May 13, 2005, at C3, available at 2005 WLNR 7553692 [hereinafter *A Push for Central American*].

66. *See id.*

67. Kevin G. Hall & James Kuhnhehn, *CAFTA Support, Opposition Are Mottled*, PHILADELPHIA INQUIRER (Pa.), July 3, 2005, at E03, available at 2005 WLNR 15741069.

68. *See* Jim Abrams, *Senate Panel Approves CAFTA*, PHILADELPHIA INQUIRER (Pa.), June 30, 2005, at C05, available at 2005 WLNR 15730385; *see A Push for Central American*, *supra* note 65; *see* Elizabeth Becker, *Free Trade Pact in Americas Faces Trouble*, N.Y. TIMES, May 10, 2005, at C1, available at 2005 WLNR 7325749 [hereinafter *Free Trade Pact*].

will be ruined.⁶⁹ Democrats contend that CAFTA-DR does little to make the Central American countries enforce existing minimal environmental laws.⁷⁰ Human rights organizations⁷¹ and labor unions oppose CAFTA-DR primarily due to the weak labor provisions within the agreement, which would allow the Central American countries to continue to destroy unions and deprive workers of their rights.⁷² CAFTA-DR faced fierce opposition from both Democrats and Republicans who felt that its labor and environmental provisions were lacking, providing another avenue for the loss of jobs in the United States.⁷³

1. *Fast-Track*

The speedy passage of CAFTA-DR without modifications to its most controversial provisions, environmental and labor, is in part due to the process by which it was passed.⁷⁴ Shortly before negotiations began on CAFTA-DR, Congress passed a bill granting trade promotion authority (fast-track or TPA) to the President.⁷⁵ Fast-track is the primary reason why CAFTA-DR was completed within one calendar year, whereas NAFTA was negotiated for more than seven years, and the FTAA has been in negotiations for more than a decade.⁷⁶

Fast-track was originally envisioned as a procedural mechanism enhancing the "president's credibility in negotiating complex multilateral trade agreements by streamlining the congressional approval process in return for enhanced congressional oversight."⁷⁷ Fast-track derives its power from the underlying political agreement between Congress and the President, rising from the 1974 Trade Act.⁷⁸ In this Act, Congress ordered that non-tariff agreements be executed through legislation, and that the President confer with Congress prior to entering such an agreement.⁷⁹ In exchange, Congress set up new procedures to guarantee a timely, amendment-free vote.⁸⁰ Thus, the President possesses the power to negotiate trade agreements⁸¹ if the requirements of the congressional-

69. Jerry Hagstrom, *CAFTA Narrowly Passes House: Sugar Farmers Vow to Fight Pending Bilateral and Regional Trade Deals*, GRAND FORKS HERALD (N.D.), Aug. 1, 2005, available at 2005 WLNR 15706195.

70. Edmund L. Andrews, *Small Trade Pact Becomes a Big Political Deal*, N.Y. TIMES, July 27, 2005, at C1, available at 2005 WLNR 11754657.

71. See *Free Trade Pact*, *supra* note 68.

72. See Eduardo Porter, *Group of Democrats Back Pact on Central American Trade*, JUNE 25, 2005, at C2, available at 2005 WLNR 10050310.

73. Vieth, *supra* note 64.

74. See Berger, *supra* note 18.

75. Washington Office on Latin America, *supra* note 15.

76. *Id.*

77. Policy Brief, Lael Brainard & Hal Shapiro, Brookings Inst., Fast Track Trade Promotion Authority, (Dec. 2001), <http://www.brookings.edu/comm/policybriefs/pb91.htm>.

78. *Id.*

79. *Id.*

80. *Id.*

81. Berger, *supra* note 18.

oversight procedure are met.⁸²

Fast-track places limits on Congress as to how much time may be spent debating trade agreements and it prohibits amendments to the trade bills.⁸³ This differs from trade agreements not passed under fast-track, in that Congress may debate on a trade agreement at length and may add amendments modifying the agreement.⁸⁴ Every President from 1974 to 1994 had the power to negotiate a trade deal "subject to only an up or down vote by Congress;"⁸⁵ however, this power lapsed in 1994 and was only reinstated in 2003.⁸⁶ Opponents of fast-track argue that it places foreign nations at a potentially greater advantage to challenge U.S. labor and environmental protections.⁸⁷

The TPA legislation does contain enforceable principal negotiating objectives to direct the U.S. government as it fashions free trade agreements.⁸⁸ The labor objectives Congress outlined in the TPA include: (1) ensuring that a signatory country to a U.S. trade agreement "does not fail to effectively enforce its labor laws," (2) acknowledging that trade agreement parties preserve the right to decide how to allocate resources to enforce their laws, and (3) strengthening the ability of "trading partners to promote respect for core labor standards."⁸⁹ In addition to these objectives, the TPA directs negotiators to obtain provisions in trade agreements that "treat U.S. principal negotiating objectives equally" in regards to dispute resolution procedures.⁹⁰ These principles and objectives are to be included within the free trade agreements which the United States negotiates and implements under fast-track.⁹¹

2. *Passage in Congress & Implementation*

CAFTA-DR faced an uphill battle in both the U.S. House and Senate due to fierce opposition to its labor and environmental provisions by both Democrats and Republicans.⁹² Since CAFTA-DR is not a treaty but an international agreement, it only required a majority vote in the House of Representatives and the Senate.⁹³ The Bush administration sold CAFTA-DR as not only a way of opening free trade to Central America, but also as a way to ensure the United States' security through promotion

82. Brainard & Shapiro, *supra* note 77.

83. Berger, *supra* note 18.

84. *Id.*

85. *Id.*

86. *See id.*

87. *Id.*

88. MARY JANE BOLLE, SPECIALIST IN INT'L TRADE, FOREIGN AFFAIRS, DEFENSE, & TRADE DIV., U.S. DEP'T OF STATE, DR-CAFTA LABOR RIGHTS ISSUES 6 (Congressional Research Service (CRS) July 8, 2005), available at <http://fpc.state.gov/> (select "Reports" link; then under "Congressional Research Service," select "2005 Reports" link; look under "July") [hereinafter BOLLE, DR-CAFTA].

89. *Id.*

90. *Id.*

91. *See id.*

92. Vieth, *supra* note 64.

93. Garavaglia, *supra* note 16, at 46.

of trade and democracy in the six Central American countries.⁹⁴ The Senate narrowly passed CAFTA-DR on June 30, 2005 with a 54-45 vote only after the Bush administration satisfied important Democrats with more Central American labor safeguards.⁹⁵ According to a Democrat Senator, there were pledges totaling \$160 million over four years to promote labor laws, which were obviously enough to change the Senator's vote from undecided to supporting CAFTA-DR.⁹⁶ On July 28, 2005,⁹⁷ in the House of Representatives, CAFTA-DR's approval came down to an eleventh-hour deal between the Bush administration and U.S. sugar producers securing a 217-215 vote approving CAFTA-DR.⁹⁸ President Bush signed the legislation implementing CAFTA-DR on August 2, 2005.⁹⁹

For CAFTA-DR to go into effect, "the United States and at least one other signatory state must exchange notifications that their respective national procedures have been completed to allow compliance with the agreement, in which case the agreement will enter into force on January 1, 2005, or on another mutually agreed date."¹⁰⁰ CAFTA-DR then enters into effect for the other signatory countries ninety days after the country provides notification that its national procedures are completed.¹⁰¹ As of January 1, 2006, the legislatures of El Salvador, Guatemala, and Honduras had approved CAFTA-DR, with approval pending in Costa Rica, the Dominican Republic, and Nicaragua.¹⁰²

III. LABOR PROVISIONS

In order to gain a full understanding of the effects of CAFTA-DR's labor provisions, not only must an explanation of CAFTA-DR's labor chapter be provided, but the domestic labor laws of each of the Central American parties needs to be explored to explain why CAFTA-DR's labor provisions fail to provide a meaningful vehicle for change in the labor standards of these Central American parties. Moreover, CAFTA-DR's labor provisions must be examined in light of the free trade agreements that preceded it, showing where the language used in the agreement originated and why this language is inadequate for CAFTA-DR.

A. CAFTA-DR's LABOR PROVISIONS

CAFTA-DR's labor provisions are contained within chapter 16 of the agreement.¹⁰³ Article 16.1.1 provides that:

94. See *A Push for Central American*, *supra* note 65.

95. *Id.*

96. Abrams, *supra* note 68.

97. Hagstrom, *supra* note 69.

98. Berger, *supra* note 18.

99. Garavaglia, *supra* note 16, at 46.

100. *Adoption of Central American*, *supra* note 56.

101. *Id.*

102. Berger, *supra* note 18.

103. Dominican Republic–Central America–United States Free Trade Agreement, ch. 16, Aug. 5, 2004, 119 Stat. 462, Hein's No. KAV 7157, available at <http://www.ustr.gov>.

The Parties reaffirm their obligations as members of the International Labor Organization (ILO) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up* (1998) (ILO Declaration). Each party shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in Article 16.8 are recognized and protected by its law.¹⁰⁴

Article 16.1 indicates that the parties to CAFTA-DR are members of the ILO and are committed to meeting their obligations under the ILO Declaration.¹⁰⁵ Further, each signatory country is to make every effort to ensure that the internationally recognized labor principles and rights of workers are not only established in its law, but are also protected by its law.¹⁰⁶ But this provision imposes no new duty on the signatory countries because the provision does not require that they meet the international obligations under the ILO or that the international principles and rights within the ILO Declaration and article 16.8 be recognized and protected within their national laws.¹⁰⁷ It simply requires the countries to strive to ensure that the international rights and principles are acknowledged and protected by domestic law, without giving any timeline or deadline for when the countries should have these international rights and principles within and protected by their domestic legislation.¹⁰⁸

Further, article 16.1.2 goes on to explain the duty of each signatory country in regards to its national legislation and internationally recognized labor rights:¹⁰⁹

Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in Article 16.8 and shall strive to improve those standards in that light.¹¹⁰

Article 16.8 supplies definitions for the terms used within chapter 16, and states that labor law for the purposes of chapter 16:

[M]eans a Party's statutes or regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

- (a) the right of association;

gov (under "Trade Agreements," select "Bilateral" link; then select the agreement; then under "CAFTA Background," select "Final Text" link).

104. *Id.* art. 16.1.1 (citation omitted).

105. *See id.*

106. *See id.*

107. *See* Briefing Paper, Human Rights Watch, Labor Rights Protections in CAFTA 3 (Oct. 14, 2003), <http://hrw.org/backgrounder/usa/cafta1003.htm> [hereinafter Labor Rights Protections].

108. *See id.*

109. *See* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.1.2.

110. *Id.*

- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
- (e) acceptable working conditions of work with respect to minimum wages, hours of work, and occupational safety and health.¹¹¹

Basically, article 16.1.2 only obligates signatory countries to enforce the set of labor laws they already have in place.¹¹² As with article 16.1.1, article 16.1.2 does not compel the signatory countries to have domestic labor standards consistent with the internationally recognized labor rights set out in article 16.8, nor does it require the parties to improve upon those standards.¹¹³ Article 16.1.2 simply requests that the parties strive to ensure that their domestic laws allow for labor standards in harmony with the rights within article 16.8, and that the parties try to improve upon those standards.¹¹⁴ It is important to note that none of the paragraphs within article 16.1 require any action on the part of the signatory countries in regards to their labor laws, and that nothing within article 16.1 prevents the signatory countries from weakening their labor laws so as to gain an unfair trade advantage.¹¹⁵ Article 16.2.2 does state that the signatory countries “shall strive to ensure that it does not waive or derogate from . . . such laws [domestic labor laws] in a manner that weakens or reduces” compliance with rights listed in article 16.8 to encourage trade or investment within the country.¹¹⁶ But this article does not demand that the parties not take such action and allows plenty of room for the countries to maneuver.¹¹⁷

Since each country is only obligated to enforce its own labor laws, article 16.2 outlines enforcement of labor laws in each of the member states.¹¹⁸ In article 16.2.1(a), parties to CAFTA-DR “shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties”.¹¹⁹ Article 16.2.1(b) declares that “a Party is in compliance with subpara-

111. *Id.* art. 16.8.

112. LABOR ADVISORY COMM. FOR TRADE NEGOTIATIONS AND TRADE POL’Y, REPORT TO THE PRESIDENT, THE CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE ON THE U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT 10 (Mar. 19, 2004), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA_Reports/asset_upload_file63_5935.pdf [hereinafter LABOR ADVISORY COMM.].

113. *See* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.1.1-2.

114. *See id.*; *see* LABOR ADVISORY COMM., *supra* note 112, at 10.

115. *See* LABOR ADVISORY COMM., *supra* note 112, at 10.

116. *See* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.2.2 (added explanatory phrase “domestic labor laws” for clarity).

117. *See id.*

118. *Id.*

119. *Id.*

graph (a)” where the party has pursued a course of action or inaction based upon reasonable exercise of their discretion or made “a *bona fide* decision” about the distribution of resources.¹²⁰

In regards to ensuring compliance by the parties with the labor provisions, article 16.6.6 allows parties, where they have failed to resolve a dispute over compliance with article 16.2.1(a) within sixty days, to request consultation provided in article 20.4 or a meeting of the commission provided in article 20.5, and recourse to provisions in chapter 20 (dispute resolution).¹²¹ Additionally, a party must first pursue resolution of the article 16.2.1(a) dispute in accordance with chapter 16 prior to seeking dispute settlement, and dispute settlement is not available to any party for any dispute rising from any other chapter 16 provision.¹²² Therefore, the only situation in which a party may invoke the dispute settlement provisions under chapter 20 is when another party fails to enforce its labor laws in a manner affecting trade between the parties, creating an inequality in the procedures and remedies provided for labor disputes within chapter 16.¹²³ Moreover, in the event a party violates article 16.2.1(a) and is sanctioned, the maximum fine they will have to pay is capped at fifteen million dollars, amounting to 3.4 percent of the duties the United States collected from signatory countries in 2003 and less than 0.065 percent of the total two-way trade with Central America in 2003.¹²⁴ In addition, any fine paid by a violating party could potentially end up being paid back to the violating country to assist them in meeting their obligations under CAFTA-DR;¹²⁵ however, there is little oversight provided to ensure that the violating party uses the money to carry out its obligations under CAFTA-DR and to ensure that it does not use the money for some other unrelated governmental purpose.¹²⁶

1. *International Labor Organization's Labor Standards*

Article 16.1 cites the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration), to which parties reaffirm their commitment and promise to strive to ensure that the principles and rights therein are recognized and protected.¹²⁷ This ILO Declaration, issued in 1998, furthers ILO's overall goal of promoting internationally recognized labor and human rights through conventions ratified by the countries which are members to the ILO.¹²⁸ Each of the six

120. *Id.*

121. *Id.* art. 16.6.6.

122. *Id.*

123. See LABOR ADVISORY COMM., *supra* note 112, at 11.

124. *Id.* at 12.

125. *Id.*; see Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 20.16.7.

126. LABOR ADVISORY COMM., *supra* note 112, at 12.

127. Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.1.

128. Pagnattaro, *supra* note 1, at 847-48 (discussing the International Labor Organization).

Central American countries party to CAFTA-DR is a member of the ILO,¹²⁹ and thus is obliged to be in compliance with the ILO's declarations.¹³⁰

The ILO Declaration states that all members are obligated "to respect, to promote and to realize" the principles enumerated within the ILO Declaration.¹³¹ The members' obligation consists of implementing national labor legislation that fully protects the fundamental principles and rights listed in the ILO Declaration.¹³² CAFTA-DR's labor chapter fails to require that the national labor legislation of the parties uphold the ILO principles and fully protect the rights of workers.¹³³ Furthermore, CAFTA-DR does not even obligate the parties to enforce their existing labor laws; therefore, even if a country has a law recognizing an international labor right, the country may choose not to enforce that law without consequence under CAFTA-DR.¹³⁴

2. *The Six Central American Countries' Labor Standards*

Currently, all of the six Central American countries have labor laws that fail to meet international standards.¹³⁵ Abuses of internationally recognized labor rights in Central America are unending.¹³⁶ Additionally, the Central American governments systematically and flagrantly fail to enforce their existing labor laws.¹³⁷ The ILO and the U.S. Department of State have consistently criticized the labor laws of the CAFTA-DR countries because they fall miserably short of meeting international standards.¹³⁸ Adding to the problem is that countries lack the political will necessary to bring their labor laws into conformity with international standards.¹³⁹ Almost every reform in Central America's labor laws during the past fifteen years is due to a direct threat to remove trade benefits under the United States' preference programs.¹⁴⁰

Even United States Trade Representative (USTR) Robert B. Zoellick, at the start of CAFTA-DR negotiations, acknowledged the serious problems with the Central American countries' labor laws, and Zoellick's Deputy USTR testified before Congress in 2003, "[W]e need to get those,

129. International Labour Organization, Alphabetical list of ILO Member Countries, <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited Feb. 16, 2005).

130. See Labor Rights Protections, *supra* note 107, at 3.

131. International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, June 19, 1998, <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (signed in Geneva at ILO's 86th session).

132. Labor Rights Protections, *supra* note 107, at 3.

133. See *id.*

134. See Briefing Paper, Human Rights Watch, CAFTA's Weak Labor Rights Protections: Why the Present Accord Should Be Opposed 2-3 (Mar. 10, 2004), <http://hrw.org/english/docs/2004/03/09/usint8099.htm>.

135. *Id.* at 2.

136. Pagnattaro, *supra* note 1, at 890.

137. Labor Rights Protections, *supra* note 107, at 4.

138. LABOR ADVISORY COMM., *supra* note 112, at 9.

139. *Id.*

140. *Id.* at 10.

the labor standards and the enforcement of labor rights[,] up to a certain level before we would find acceptable a commitment to enforce those laws.”¹⁴¹ Yet none of the CAFTA-DR parties took any action during the negotiations process to get its labor laws into compliance with international standards.¹⁴² Further, the Central American governments have allowed labor law reform proposals to languish in their parliaments for years without making any progress towards adoption.¹⁴³ Therefore, in order to gain a clearer understanding of the labor laws in effect in the six signatory countries to CAFTA-DR and the ongoing labor rights violations, the following sections will examine the laws specifically pertaining to the rights enumerated in article 16.8 of CAFTA-DR.

a. Costa Rica

In regards to the right of association,¹⁴⁴ the law provides that workers have the right to join unions of their choice without prior governmental authorization.¹⁴⁵ But the ILO has repeatedly encouraged the government to bring its laws into complete compliance with internationally recognized labor rights through the adoption of new measures.¹⁴⁶ The Constitution of Costa Rica protects the right of workers to organize.¹⁴⁷ Complaints from workers, along with confusion and uncertainty in rulings by the Costa Rican Constitutional Court, has resulted in the ILO expressing concern regarding the enforcement of this right and expressing hope that the government will bring its law and practice into harmony with internationally recognized norms.¹⁴⁸ Bonded or compulsory labor¹⁴⁹ is prohibited by the Costa Rican Constitution, and laws guarding against such labor by children are generally enforced.¹⁵⁰

In regards to a minimum working age for children and the prohibition and elimination of the worst forms of child labor,¹⁵¹ Costa Rica, in the

141. *Id.* at 11.

142. *Id.*

143. *Id.*

144. Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.8.

145. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, COSTA RICA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICE - 2002 (Mar. 31, 2003), <http://www.state.gov/g/drl/rls/hrrpt/2002/18326.htm> [hereinafter COSTA RICA: COUNTRY REPORT].

146. *Id.*

147. *Id.* (explaining the right to organize within Costa Rican law); CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE COSTA RICA tit. 5, art. 60, *available at* http://www.costaricalaw.com/LEGALNET/constitutional_law_/constitutional_law.php; Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.8 (listing the right to organize as an internationally recognized labor right).

148. *See* COSTA RICA: COUNTRY REPORT, *supra* note 145.

149. Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.8 (listing the prohibition on forced or compulsory labor as an internationally recognized labor right).

150. COSTA RICA: COUNTRY REPORT, *supra* note 145.

151. Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.8 (listing the minimum working age for children and the

Childhood and Adolescent Code, sets the minimum age for employment of children at fifteen;¹⁵² however, chapter 7 of the Labor Code allows for children between the age of twelve and fifteen to work less than five hours daily and no more than thirty hours per week.¹⁵³ Child labor laws are generally enforced in the formal sector within Costa Rica; but child labor is an integral part of Costa Rica's informal economy, particularly agriculture.¹⁵⁴ Costa Rica's Labor Ministry reported in 2002 that there were 72,000 children between the ages of five and sixteen illegally employed within the country.¹⁵⁵

As to the right of acceptable working conditions,¹⁵⁶ the Constitution entitles every worker to a minimum wage and a regular working day of eight hours or forty-eight hours a week, with an overtime provision as well.¹⁵⁷ During the negotiations of CAFTA-DR, the Costa Rican government introduced a proposal to modify its Labor Code so that working hours would be measured on a year-long calendar, which could allow violations of international forced labor standards.¹⁵⁸ Based upon all of these violations, Costa Rica fails to comply with article 16.2.1(a) by not effectively enforcing its labor laws protecting the five internationally recognized labor rights defined in CAFTA-DR article 16.8.¹⁵⁹

b. The Dominican Republic

The right to organize and the right of association are provided for in the Dominican Republic's Constitution.¹⁶⁰ The Labor Code, as well, provides for recognition of unions and prohibits firing union members and

prohibition and elimination of the worse forms of child labor as an internationally recognized labor right).

152. LA GACETA [OFFICIAL JOURNAL] CHILDHOOD AND ADOLESCENT CODE Ley N° 7739, tit. 2, ch. 7, art. 78 (Costa Rica), *available at* <http://annualreview.law.harvard.edu/population/children/childrenlaws.htm>.
153. CÓDIGO DE TRABAJO [LABOR CODE], ch. 7, art. 89 (Costa Rica), *available at* http://www.costaricalaw.com/LEGALNET/labor_law/labcode_titulo_07.php.
154. COSTA RICA: COUNTRY REPORT, *supra* note 145.
155. *Id.*
156. Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.8 (listing acceptable working conditions as an internationally recognized labor right).
157. CONSTITUCIÓN POLITICA DE LA REPÚBLICA DE COSTA RICA, *supra* note 147, tit. 5, arts. 57, 58.
158. Petition from Int'l Labor Rights. Fund & Asociación Servicios de Promoción Laboral to the Chairman of the GSP Subcommittee, Petition to Review Costa Rica's Country Eligibility Under the Generalized System of Preferences (GSP) for Violation of Internationally Recognized Worker's Rights 3 (Dec. 13, 2004), <http://www.laborrights.org/projects/linklabor/GSP%20Costa%20Rica%2012-04.pdf> [hereinafter Petition to Review Costa Rica].
159. *See id.*; *see* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, arts. 16.2.1(a), 16.8; *see* COSTA RICA: COUNTRY REPORT, *supra* note 145.
160. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, DOMINICAN REPUBLIC: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2004 (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41758.htm> [hereinafter DOMINICAN REPUBLIC: COUNTRY REPORT].

organizers;¹⁶¹ but these laws fall short of the international right of association and the right to organize.¹⁶² Additionally, there were widespread reports of intimidation by employers in the free trade zone areas to thwart union activity.¹⁶³ The Dominican Republic's law does prohibit any form of forced or compulsory labor; but in 2004, reports were made that such labor practices occurred.¹⁶⁴ Examples of the forced or compulsory labor reported include incidents of workers not being allowed to leave sugar plantations during harvest¹⁶⁵ and children forced into a form of indentured servitude.¹⁶⁶

The Dominican Republic in its Labor Code and newly enacted Code for Minors provides that no one under the age of fourteen may be employed, with restrictions on the work of children between the ages fourteen and sixteen.¹⁶⁷ Child labor though is a serious problem in the Dominican Republic, with tens of thousands of children going to work before reaching the age of fourteen.¹⁶⁸ In regards to acceptable working conditions, the Dominican Republic's Constitution and Labor Code provide that minimum wage levels are to be set by various governmental entities depending upon the sector of the work.¹⁶⁹ Overall however, the national minimum wage failed to provide a sufficient amount for living for workers and their family.¹⁷⁰ Workers on sugar plantations are paid as little as four dollars a day in tickets, which are redeemable only at plantation-run stores¹⁷¹ that charge the workers a service charge reducing their wages even further.¹⁷² Enforcement of labor laws within the Dominican Republic is a severe problem, especially within the free trade zones.¹⁷³ Thus, it can be concluded that the Dominican Republic falls short of the requirements of article 16.2.1(a) of CAFTA-DR.¹⁷⁴

c. El Salvador

El Salvador's Constitution provides for the right of association; however, the ILO has consistently found that this right is impermissibly re-

161. *Id.*

162. LABOR ADVISORY COMM., FOR TRADE NEGOTIATIONS AND TRADE POL'Y, REPORT TO THE PRESIDENT, THE CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE ON THE UNITED STATES-DOMINICAN REPUBLIC FREE TRADE AGREEMENT 5 (Apr.22, 2004), http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/DR_Reports/asset_upload_file12_3321.pdf [hereinafter REPORT TO THE PRESIDENT].

163. DOMINICAN REPUBLIC: COUNTRY REPORT, *supra* note 160.

164. *Id.*

165. REPORT TO THE PRESIDENT, *supra* note 162, at 7.

166. DOMINICAN REPUBLIC: COUNTRY REPORT, *supra* note 160.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. REPORT TO THE PRESIDENT, *supra* note 162, at 7.

172. DOMINICAN REPUBLIC: COUNTRY REPORT, *supra* note 160.

173. REPORT TO THE PRESIDENT, *supra* note 162, at 6.

174. See Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.2.1(a).

stricted by the Labor Code and the El Salvadoran government.¹⁷⁵ Both the Constitution and the Labor Code state that there is a right to organize and bargain collectively for workers in the private sector and for some groups within governmental agencies.¹⁷⁶ Nevertheless, the El Salvadoran government fails to strictly enforce these rights, with numerous complaints and charges against the government as being biased towards labor and erecting substantial hurdles to the exercise of these rights.¹⁷⁷ El Salvador's Constitution forbids forced or compulsory labor, except in the event of a natural catastrophe or other cases specified by law.¹⁷⁸ This prohibition is usually enforced, but there remain problems throughout the country with the trafficking of persons.¹⁷⁹

Article 38 of El Salvador's Constitution states that no person fourteen years of age or younger who is still within the mandatory age for school may work unless authorized when employment "is indispensable for the sustenance of themselves or their families".¹⁸⁰ Nonetheless, the number of children between the ages of five and thirteen working was more than 220,000 according to ILO/IPEC research, with 30,000 children performing hazardous activities.¹⁸¹ Though the Ministry of Labor inspectors conduct inspections, they focus almost completely on the formal sector, where child workers are rare, and little on the informal sector, where child labor is the most prevalent.¹⁸² Regarding the right to have acceptable working conditions, an executive decree sets the minimum wage, the law sets the maximum number of working hours per week at forty-four, and the constitution requires all employers to ensure that workers' health and safety is not at risk in the workplace.¹⁸³ Workers making minimum wage with benefits are unable to provide a decent standard of living for their family, but this assumes that their employer pays them the minimum wage set by the government; many employers do not.¹⁸⁴ Additionally, the Ministry of Labor is ineffective in its attempts to enforce the labor laws, due in part to the constant problem of corruption among the labor inspectors and

175. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, *EL SALVADOR: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2004* (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41760.htm> [hereinafter *EL SALVADOR: COUNTRY REPORT*]; Petition from Int'l Labor Rights. Fund & Asociación Servicios de Promoción Laboral to the Chairman of the GSP, Petition to Review El Salvador's Country Eligibility Under the Generalized System of Preferences (GSP) for Violation of Internationally Recognized Worker's Rights 3 (Dec. 13, 2004), <http://www.laborrights.org/projects/linklabor/GSP%20El%20Salvador%2012-04.pdf> [hereinafter *Petition to Review El Salvador*].

176. *EL SALVADOR: COUNTRY REPORT*, *supra* note 175.

177. *See id.*; *see also* *Petition to Review El Salvador*, *supra* note 175, at 3.

178. *EL SALVADOR: COUNTRY REPORT*, *supra* note 175.

179. *Id.*

180. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE EL SALVADOR art. 38, *available at* <http://pdha.georgetown.edu/Constitutions/ElSal/ElSal83.html>.

181. *EL SALVADOR: COUNTRY REPORT*, *supra* note 175.

182. *See id.*

183. *Id.*

184. *Id.*

labor courts.¹⁸⁵ Thus, article 16.2.1(a) of CAFTA-DR is violated by El Salvador due to a lack of enforcement of the laws protecting the internationally recognized labor rights set out in CAFTA-DR.¹⁸⁶

d. Guatemala

Both the Guatemalan Constitution and the Labor Code provide for the freedom of association and the right to join a union,¹⁸⁷ but the feeble and ineffective attempt of enforcement by the government results in these rights being very difficult to exercise.¹⁸⁸ The requirements to form a union are almost insurmountable, and employers are known to retaliate against workers for forming or participating in unions.¹⁸⁹ In addition to the right of association, workers do have the right to organize and bargain collectively.¹⁹⁰ Yet intimidation and pressure by employers hinders employees' efforts to exercise their right to organize¹⁹¹ and collectively bargain.¹⁹² As to the prohibition of forced or compulsory labor, Guatemala's Constitution provides that "no person can be submitted to servitude or any other condition that reduces their dignity."¹⁹³ Forced labor in Guatemala is a problem, and it takes the form of employees forced to work overtime without the premium pay mandated by the law.¹⁹⁴

Article 102 of Guatemala's Constitution prohibits employers from hiring children who are fourteen years old or younger in any type of job unless exempted by law.¹⁹⁵ The Labor Code provides that children fourteen and younger may be able to work if done through their legal representative or within the approval of the General Labor Inspectorate; however, the work the children do must be adapted to their age, physical condition, and mental development level.¹⁹⁶ The number of children under eighteen years of age who work throughout the year has grown from only 20 percent in 2000 to 23 percent in 2004.¹⁹⁷ The ILO estimates that around 507,000 children between the ages of seven and fourteen

185. *Id.*

186. See Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, arts. 16.2.1(a), 16.8.

187. CENTRO PARA ACCIÓN LEGAL EN DERECHOS HUMANOS (CALDH) & INT'L LABOR RIGHTS FUND, LABOR RIGHTS AND LEGAL, POLITICAL AND CULTURAL OBSTACLES IN GUATEMALA 8 (2004), available at <http://www.laborrights.org> (select "ILRF Publications" link).

188. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, GUATEMALA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2004 (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41762.htm> [hereinafter GUATEMALA: COUNTRY REPORT].

189. *Id.*

190. *Id.*

191. See *id.*

192. CALDH & INT'L LABOR RIGHTS FUND, *supra* note 187, at 15.

193. *Id.* at 20.

194. GUATEMALA: COUNTRY REPORT, *supra* note 188.

195. CALDH & INT'L LABOR RIGHTS FUND, *supra* note 187, at 24.

196. *Id.*

197. GUATEMALA: COUNTRY REPORT, *supra* note 188.

work,¹⁹⁸ with the top employment sectors being agriculture, fireworks manufacturers, and mines and quarries.¹⁹⁹ Due to weak labor inspections and labor courts, the labor laws regarding children fail to be effectively enforced.²⁰⁰

As to acceptable conditions of work, the law sets the minimum wages, an eight-hour workday, and a forty-eight-hour work week. Additionally, there are occupational health and safety standards, but they are inadequate and rarely enforced.²⁰¹ The minimum wage fails to provide a sufficient standard of living, with an estimated 57 percent of Guatemalans living under the poverty line and another 21.5 percent living in extreme poverty.²⁰² Further, employers force employees to work overtime, usually without pay, and employers are able to do so due to inadequate enforcement of the labor laws and inefficiencies in the labor courts.²⁰³ Thus, Guatemala's failure to enforce its labor laws contravenes its obligation under article 16.2.1(a) of CAFTA-DR.²⁰⁴

e. Honduras

Although Honduras' labor laws provide for the right of association, the laws are not in total compliance with ILO standards due to various restrictions placed upon the exercise of this right.²⁰⁵ Additionally, Honduran law grants the right to organize and bargain collectively, and the Constitution provides the right to strike.²⁰⁶ Employers though often refuse to negotiate with unions, and the restrictions upon the right to strike are strongly criticized by the ILO.²⁰⁷ Both the constitution and the law forbid forced or compulsory labor, but instances of compulsory overtime have been reported at maquiladora plants.²⁰⁸

The Honduran Constitution and Labor Code prohibit children less than sixteen years of age from being employed, but fourteen and fifteen year olds may work with parental consent or authorization of the Minis-

198. *Id.*

199. CALDH & INT'L LABOR RIGHTS FUND, *supra* note 187, at 23.

200. GUATEMALA: COUNTRY REPORT, *supra* note 188.

201. *Id.*

202. *Id.*

203. *Id.*

204. See Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, arts. 16.2.1(a), 16.8.

205. Petition from Int'l Labor Rights Fund & Asociación Servicios de Promoción Laboral to the Chairman of the GSP Subcommittee, Petition to Review Honduras' Country Eligibility Under the Generalized System of Preferences (GSP) for Violation of Internationally Recognized Workers' Rights 3-4 (Dec. 13, 2004), <http://www.laborrights.org/projects/linklabor/GSP%20Honduras%2012-04.pdf> [hereinafter Petition to Review Honduras].

206. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, HONDURAS: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2004, (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41765.htm> [hereinafter HONDURAS: COUNTRY REPORT].

207. *Id.*

208. *Id.*

try of Labor.²⁰⁹ The ILO reports that 490,000 children in Honduras work, with 97,000 children between ten and fourteen years of age leaving school to go to work.²¹⁰ Further, child labor laws are not enforced effectively outside the maquiladora sector, with violations occurring frequently in rural areas and small businesses.²¹¹ In regards to the right to acceptable working conditions, Honduran law does provide a minimum wage and a bonus equaling one month's salary in June and December of each year; however, the minimum wage is insufficient to provide a decent standard of living, and the Ministry of Labor lacks the resources to ensure that the bonuses are actually paid to workers.²¹² Though the law provides for an eight-hour work day and forty-four-hour workweek, employers habitually ignore these laws due to the level of unemployment and lack of enforcement by the Ministry of Labor.²¹³ In summary, Honduras violates article 16.2.1(a) of CAFTA-DR by ineffectively enforcing its labor laws and placing severe restrictions on worker rights.²¹⁴

f. Nicaragua

Nicaragua's Constitution in article 87 recognizes the right of association, and article 204 of the Labor Code sets out the rights of trade unions.²¹⁵ While these laws provide for freedom of association, the government sides with business, lacking the political will to enforce the laws and allowing the repression of unions.²¹⁶ As to the right to organize and bargain collectively, the constitution recognizes both of these rights, but the Labor Code places severe restrictions on the right to strike, causing few strikes to be legal.²¹⁷ Moreover, employers commonly fire employees who attempt to form a union, with the Ministry of Labor as a rule finding that the employer acted within the law.²¹⁸ The Nicaraguan Constitution prohibits forced or compulsory labor, with no major failings in the law or enforcement of this right being reported.²¹⁹

In regards to the prohibition of child labor, article 131 of the Labor Code provides that the minimum working age is fourteen years old, with exceptions regulated by the Labor Inspector-General.²²⁰ Further, the La-

209. *Id.*

210. Petition to Review Honduras, *supra* note 205, at 3.

211. HONDURAS: COUNTRY REPORT, *supra* note 206.

212. *Id.*

213. *Id.*

214. *See id.*; *see* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.2.1(a).

215. INT'L LABOR RIGHTS FUND, LEGAL, POLITICAL AND PRACTICAL OBSTACLES TO THE ENFORCEMENT OF LABOR LAWS IN NICARAGUA 5, 11 (2004), <http://www.laborrights.org/> (select "ILRF Publications" link).

216. *Id.*

217. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, NICARAGUA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2004 (Feb. 28, 2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41768.htm> [hereinafter Nicaragua: Country Report].

218. *Id.*

219. *See id.*; *see* INT'L LABOR RIGHTS FUND, *supra* note 215, at 21.

220. INT'L LABOR RIGHTS FUND, *supra* note 215, at 22.

bor Code prohibits children under eighteen years of age from performing "unhealthy work or work with moral danger".²²¹ Nevertheless, child labor is an issue in Nicaragua in both rural and urban areas, and inadequate enforcement of the laws perpetuates the problem.²²²

Acceptable working conditions, which include minimum wages, hours of work, and occupational safety and health,²²³ are provided for in Nicaragua through the Labor Code.²²⁴ The minimum wage is specifically set for each employment sector, but in none of the sectors did the minimum wage meet the \$141 amount that the government estimates is needed by an urban family to buy a basic basket of goods each month.²²⁵ Though the Labor Code incorporates an eight-hour workday and forty-eight-hour week, these provisions are consistently ignored.²²⁶ Moreover, workers complain of being forced to do overtime without pay, working in poor conditions, and of being told when or if they may go to the restroom.²²⁷ While Nicaragua appears to comply with the prohibition on forced or compulsory labor, the government fails to enforce its labor laws and provide an unbiased system by which workers' complaints may be heard and, therefore, is not in compliance with article 16.2.1(a) of CAFTA-DR.²²⁸

B. OTHER FREE TRADE AGREEMENTS' LABOR PROVISIONS

CAFTA-DR's labor provisions are an off-shoot of the North American Agreement on Labor Cooperation (NAALC),²²⁹ which is the side agreement with NAFTA's labor provisions.²³⁰ NAALC's labor provisions are a model that the United States uses when linking workers' rights safeguards to free trade agreements.²³¹ A second model the United States uses is illustrated by the provisions in the free trade agreement between the United States and Jordan (Jordan FTA), where the labor provisions are included within the body of the agreement and subject to sanctions provided in a dispute resolution provision.²³² The final model the United States uses for labor provisions in its free trade agreements is the one used for CAFTA-DR, as well as, the five preceding free trade agreements

221. *Id.*

222. NICARAGUA: COUNTRY REPORT, *supra* note 217.

223. Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.8.

224. NICARAGUA: COUNTRY REPORT, *supra* note 217.

225. *Id.*

226. *Id.*

227. *Id.*

228. *See id.*; *see* INT'L LABOR RIGHTS FUND, *supra* note 215, at 21-22; *see* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.2.1(a).

229. Pagnattaro, *supra* note 1, at 876.

230. *Id.*

231. MARY JANE BOLLE, SPECIALIST IN INT'L TRADE, FOREIGN AFFAIRS, DEFENSE, & TRADE DIV., U.S. DEP'T OF STATE, FREE TRADE AGREEMENTS WITH SINGAPORE AND CHILE: LABOR ISSUES 6, tbl.3 (Congressional Research Service (CRS) Aug. 13, 2003), available at <http://fpc.state.gov/documents/organization/22880.pdf> [hereinafter BOLLE, FREE TRADE AGREEMENTS].

232. *Id.*

signed.²³³ This third model, like the Jordan FTA, includes labor provisions in the body of the agreement, but it permits sanctions only when a country does not enforce its domestic labor laws.²³⁴ The labor provisions of NAFTA, the Jordan FTA, the U.S.-Chile Free Trade Agreement (Chile FTA), and the U.S.-Singapore Free Trade Agreement (Singapore FTA) will each be discussed for its role in the development of CAFTA-DR's labor provisions, its effects within the signatory countries, and, thus, any inferences that can be drawn from the effects that CAFTA-DR may have.

I. NAFTA

The labor provisions for NAFTA were not included within the main body of the agreement, but were part of a side agreement, the North American Agreement on Labor Cooperation (NAALC).²³⁵ NAALC required Canada, Mexico, and the United States to enforce their existing labor laws, without any additional obligations.²³⁶ NAALC states in Annex 1 that the countries are committed to promote eleven guiding principles, reflecting the parties' areas of concern in relation to worker's rights.²³⁷ These guiding principles are similar to the "ILO labor principles and internationally recognized worker rights" set out within subsequent free trade agreements.²³⁸ The listed labor rights in NAALC "do not establish common minimum standards for [the parties'] domestic law."²³⁹ Therefore, the principles are simply goals that the parties' commit to promote and are not enforceable standards to which they must comply.²⁴⁰ Moreover, a party can only be sanctioned for violating occupational safety and health, child labor, and the minimum wage technical standard, but freedom of association and the right to organize and to bargain collectively are subject to only cooperative consultation.²⁴¹ The maximum penalty a violating party could face is fifteen million dollars for the first year, and in the event it does not pay the fine, a suspension of NAFTA benefits.²⁴²

Since NAALC is a side agreement, its disciplinary procedures are different and more complicated than those in NAFTA, resulting in NAALC being more of a window dressing than a real enforcement tool of workers' rights.²⁴³ This lack of enforceability has allowed abuses of workers' rights to continue in Mexico though the country's labor laws on paper

233. *Id.*

234. *Id.*

235. Pagnattaro, *supra* note 1, at 876.

236. *Id.* at 876-77.

237. North American Agreement on Labor Cooperation, Annex 1, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1480, available at <http://www.naalc.org/english/agreement.shtml>.

238. See Bolle, *supra* note 231, at 6 tbl.3.

239. North American Agreement on Labor Cooperation, *supra* note 237, annex 1.

240. See *id.*; see Pagnattaro, *supra* note 1, at 877.

241. Pagnattaro, *supra* note 1, at 877.

242. BOLLE, DR-CAFTA, *supra* note 88, at 3.

243. Pagnattaro, *supra* note 1, at 878.

appear to meet international labor standards.²⁴⁴

2. *United States–Jordan Free Trade Agreement*

The United States and Jordan signed a free trade agreement on October 24, 2000, and included within the body of the agreement an article specifically addressing labor rights.²⁴⁵ Due to the inclusion of the rights within the text of the agreement, the Jordan FTA is considered more effective at enforcing labor rights and a “high-water mark for labor provisions”.²⁴⁶ Moreover, out of the Jordan FTA came the Jordan standard of including enforceable labor provisions within the main body of free trade agreements.²⁴⁷ This Jordan standard is reflected in the Trade Promotion Act of 2002 as a standard to be met in all free trade agreements.²⁴⁸

Articles 6.1 through 6.3 of the Jordan FTA read almost exactly like the labor provisions provided in CAFTA-DR’s articles 16.1 and 16.2.²⁴⁹ Article 6.3 states that the parties shall strive to ensure that its domestic legislation is consistent with internationally recognized labor rights enumerated in the agreement.²⁵⁰ In addition, the Jordan FTA includes an anti-relaxation clause,²⁵¹ stating that “each Party shall strive to ensure that it does not waive or otherwise derogate from . . . such laws [domestic labor laws] as an encouragement for trade with the other Party.”²⁵² Though the Jordan FTA’s provisions are not the same as the NAALC, it embraces many of the same ideals.²⁵³

The Jordan FTA authorizes sanctions for a violation of any of its labor provisions, including failure to uphold the ILO labor principles and derogating from domestic labor laws to encourage trade.²⁵⁴ Additionally, the dispute resolution provisions are the same for both the commercial sections of the agreement and the labor section,²⁵⁵ allowing a party to “take any appropriate and commensurate measure” in the event the Joint Com-

244. *Id.*

245. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, art. 6, Oct. 24, 2000, 41 I.L.M. 63, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf [hereinafter Jordan Agreement].

246. Pagnattaro, *supra* note 1, at 879.

247. Kimberly Ann Elliott, *Labor Standards and the Free Trade Area of the Americas* 16 (Inst. for Int’l Econ., Working Paper No. 03-7, 2003), available at <http://www.iie.com/publications/wp/03-7.pdf>.

248. Labor Rights and Trade, *supra* note 2.

249. Compare Jordan Agreement, *supra* note 245, art. 6, at 9-10 (setting out the labor obligations of each party), and Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.1 (stating almost identical labor provisions for the signatory countries).

250. Jordan Agreement, *supra* note 245, art. 6, at 10.

251. Pagnattaro, *supra* note 1, at 880.

252. Jordan Agreement, *supra* note 245, art. 6, at 9.

253. Pagnattaro, *supra* note 1, at 879.

254. See BOLLE, FREE TRADE AGREEMENTS, *supra* note 231, at 6 tbl.3.

255. Alisa DiCaprio, *Are Labor Provisions Protectionist?: Evidence from the Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL’Y J. 1, 13 (2004).

mittee established in the agreement is not able to resolve the dispute.²⁵⁶ But the ambiguous language used in the dispute resolution provisions makes it very unlikely that any dispute would reach the point where “any appropriate and commensurate measure”²⁵⁷ would be taken by one of the parties.²⁵⁷

Prior to the signing of the Jordan FTA, Jordan had fairly decent national labor laws²⁵⁸ and had ratified twenty-three ILO conventions.²⁵⁹ Though the language of the labor provisions is vague allowing room for manipulation,²⁶⁰ the labor provisions provided for in the Jordan FTA were acceptable for Jordan.²⁶¹

3. *United States–Singapore Free Trade Agreement and the United States–Chile Free Trade Agreement*

The Chile FTA and the Singapore FTA were signed within one month of each other in 2003.²⁶² Unlike the Jordan FTA, these free trade agreements were negotiated and implemented after the passage of the Trade Promotion Act of 2002 (TPA or fast-track).²⁶³ Therefore, the Chile FTA and the Singapore FTA, as well as all other free trade agreements negotiated after 2002, are to meet the overall trade negotiating objectives and principal negotiating objectives expressed within the TPA,²⁶⁴ such as treating all provisions within trade agreements the same with respect to dispute settlement availability, procedures, and remedies.²⁶⁵

In the Chile and Singapore FTAs, the parties agree to strive to ensure that their domestic laws protect ILO labor principles and internationally recognized workers’ rights.²⁶⁶ Both of the agreements require the parties to enforce their existing labor rights legislation even if it does not meet international standards.²⁶⁷ The Chile and Singapore FTAs are similar to NAFTA, and unlike the Jordan FTA, in that they only allow communication, investigation, and recommendations to settle the majority of the complaints regarding labor provisions.²⁶⁸ Further, signatory countries

256. Jordan Agreement, *supra* note 245, art. 17, at 18.

257. Elliott, *supra* note 247, at 15 (emphasis in original).

258. DiCaprio, *supra* note 255, at 20.

259. Pagnattaro, *supra* note 1, at 879.

260. See Elliott, *supra* note 247, at 15.

261. Thea M. Lee, Assistant Dir. for Int’l Econ., Am. Fed’n of Labor & Cong. of Indus. Org. (AFL-CIO), Comments on the Proposed U.S. - Central America Free Trade Agreement (CAFTA) (Nov. 19, 2002), <http://www.usleap.org/trade/AFLCIOCAFTAcomments11-02.html>.

262. Compare Chile–United States Free Trade Agreement, U.S.–Chile, June 6, 2003, at 24-2, http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html, and United States–Singapore Free Trade Agreement, U.S.–Sing., May 6, 2003, at 236, http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

263. Pagnattaro, *supra* note 1, at 880.

264. *Id.*

265. LABOR ADVISORY COMM., *supra* note 112, at 11.

266. BOLLE, FREE TRADE AGREEMENTS, *supra* note 231, at 6 tbl.3.

267. Lee, *supra* note 261.

268. BOLLE, DR-CAFTA, *supra* note 88, at 3.

may only be sanctioned for *sustained failure* to enforce its labor laws in a way affecting trade, facing a maximum fine of fifteen million dollars annually.²⁶⁹ This deviates from the Jordan FTA, which authorized sanctions for all labor provisions, placing them on equal footing with the commercial provisions.²⁷⁰ Moreover, if a fine is collected, it is to be used to promote programs within the violating country to remedy non-enforcement of its labor laws.²⁷¹ If a party refused to pay the fine, the other party could collect the fine by reinstating tariffs, on an annual basis, until the violation is remedied.²⁷²

While on balance the labor provisions in the Chile FTA and the Singapore FTA are acceptable,²⁷³ they violate the TPA by failing to meet the principal negotiation objective which states that all complaints under the free trade agreement be treated equally with regards to dispute settlement availability, procedures, and remedies.²⁷⁴ Additionally, it is possible that a party could weaken or eliminate a labor law that it is being accused of not enforcing, circumventing the dispute settlement provisions of the free trade agreement.²⁷⁵ In regards to any fines a party might face, there is the possibility that it could redirect those funds from programs to remedy the violation to other unrelated areas of government spending.²⁷⁶ Overall, the Chile and Singapore FTAs are barely, if at all, adequate for those countries, and the agreements do not require compliance with international labor rights standards, do not meet the standards required by the TPA, and do not work as models for other free trade agreements.²⁷⁷

C. CAFTA-DR'S LABOR PROVISIONS IN COMPARISON

CAFTA-DR's labor provisions fail in numerous areas, allowing the parties to continue inadequate and ineffective enforcement of domestic labor laws without ever requiring that the parties raise domestic legislation to meet international labor rights standards.²⁷⁸ These failing are, in large part, due to the use of the Chile and Singapore FTAs as models for CAFTA-DR's labor provisions.²⁷⁹ Both the Chile and Singapore FTAs are a huge step backwards from the Jordan FTA though they contain

269. *Id.* at 6 tbl.3 (italics added for emphasis).

270. *Id.* at 3.

271. Sandra Polaski, Senior Assoc., Carnegie Endowment for Int'l Peace, Testimony Before the Senate Committee on Finance on the Implementation of the U.S. Bilateral Free Trade Agreements with Singapore and Chile 2 (June 17, 2003), http://www.carnegieendowment.org/pdf/files/TED_Polaski_2003-June-Testimony_Singapore_and_Chile_FTAs.pdf.

272. *Id.*

273. *Id.*

274. BOLLE, DR-CAFTA, *supra* note 88, at 4.

275. *Id.* at 3.

276. Labor Rights Protections, *supra* note 107, at 2.

277. See, e.g., Polaski, *supra* note 271, at 2 -3; BOLLE, DR-CAFTA, *supra* note 88, at 3-4; Labor Rights Protections, *supra* note 107, at 2; LABOR ADVISORY COMM., *supra* note 112, at 9.

278. See Pagnattaro, *supra* note 1, at 890-91.

279. See *id.* at 889-90.

some similar provisions, and when combined with the egregious labor rights violations in the six Central American countries, neither of these agreements should have been used as a model for CAFTA-DR.²⁸⁰

In fact, CAFTA-DR's labor rights provisions are almost identical to the labor rights provisions in the Chile FTA and are similar to the ones in the Singapore FTA.²⁸¹ Both of these free trade agreements' provisions and structure derived from both the NAALC and the Jordan FTA.²⁸² Thus, CAFTA-DR is similar to the NAALC and the Jordan FTA, and in turn the Chile and Singapore FTAs, because it only requires countries to enforce their own labor laws.²⁸³ Similar to the NAALC, CAFTA-DR imposes capped monetary fines if disputes over particular labor provisions are unresolved.²⁸⁴ CAFTA-DR is like the Jordan FTA, and in turn the Chile and Singapore FTAs, in that its labor provisions are within the main text of the agreement.²⁸⁵ In addition, CAFTA-DR is similar to the Jordan FTA in that the parties agree "not to waive or derogate from domestic labor law to encourage trade", but CAFTA-DR, like the Chile and Singapore FTAs, adds on "encourage trade *or investment*."²⁸⁶ Different from the NAALC and the Jordan FTA, but in line with the Chile and Singapore FTAs, CAFTA-DR provides sanctions only for sustained failure by a party to enforce its labor laws "in a manner affecting trade."²⁸⁷

Understanding that the provisions in the Chile and Singapore FTAs are on balance acceptable for Chile and Singapore,²⁸⁸ these provisions are clearly insufficient for Central America considering the egregious and systemic failure to enforce existing labor legislation.²⁸⁹ The Chile and Singapore FTAs are inadequate models for CAFTA-DR because the Central American parties are developing countries that have a history of non-enforcement and hostility towards workers' rights; and the laws that exist are not in harmony with international standards.²⁹⁰ Further, both Chile and Singapore have made progress in enforcing their labor laws in regards to core labor rights;²⁹¹ however, some CAFTA-DR countries have legislation pending that would actually weaken their labor laws that already do not meet international labor standards.²⁹² Moreover, parties to CAFTA-DR could simply eliminate a domestic law to avoid dispute

280. *See id.* at 883, 885, 889-91.

281. Labor Rights Protections, *supra* note 107, at 1.

282. *See Elliott, supra* note 247, at 17.

283. *See id.*

284. *See id.*

285. *See id.*

286. BOLLE, FREE TRADE AGREEMENTS, *supra* note 231, at 6 tbl.3 (emphasis in original).

287. *Id.*

288. Polaski, *supra* note 271, at 2.

289. Labor Rights Protections, *supra* note 107, at 4.

290. *See, e.g., BOLLE, DR-CAFTA, supra* note 88, at 5; Pagnattaro, *supra* note 1, at 890-91.

291. Pagnattaro, *supra* note 1, at 891.

292. *See, e.g.,* Petition to Review Costa Rica, *supra* note 158, at 3; Petition to Review El Salvador, *supra* note 175, at 6.

settlement²⁹³ or weaken domestic labor laws to gain an advantage in trade.²⁹⁴ In support of this contention is the fact that the Central American parties have weak and irregular patterns of enforcement of domestic labor laws, combined with a legal system that is ineffectual and corrupt, providing no effective remedy at all.²⁹⁵ The failure contained within NAALC, the Jordan FTA, the Chile FTA, and the Singapore FTA, requiring countries to enforce their existing domestic laws, continues in CAFTA-DR, with the potentially devastating consequence of locking in labor standards that are unacceptable and below ILO standards.²⁹⁶

CAFTA-DR, like the Chile and Singapore FTAs, is a huge step backward from the Jordan FTA.²⁹⁷ Unlike the Jordan FTA, sanctions in CAFTA-DR may only be imposed for “*sustained failure to enforce one’s own labor laws in a manner affecting trade.*”²⁹⁸ Any claims against a party under this dispute settlement provision will arguably be difficult to prove, since the domestic labor law enforcement provision uses the language “strive to ensure.”²⁹⁹ In addition, this dispute settlement provision fails to meet the objectives set out in the TPA providing that all disputes are to have equivalent dispute settlement procedures and remedies.³⁰⁰

Though the NAALC has its failings, it at least provides for a suspension of benefits up to the amount of the fine assessed against a party when the party either fails to pay a fine assessed or when a party does not implement a plan of action to remedy the violation.³⁰¹ Under CAFTA-DR, if a violating party does not comply with the action plan issued, then the complaining party may only suspend “benefits of equivalent effect.”³⁰²

The TPA requires that the U.S. administration (Administration) make assessments and reports on the labor situation as it truly exists in the countries with which it is negotiating, allowing the Administration to modify labor provisions within the final trade agreement so as to make them meaningful and address the reality of labor rights in each country.³⁰³ Unfortunately, the Administration failed to do this with CAFTA-DR because the Administration basically cut and pasted provisions from previous free trade agreements into CAFTA-DR without regard for the real situation within the Central American countries.³⁰⁴ As stated previously, numerous times, these Central American countries lacked the po-

293. BOLLE, DR-CAFTA, *supra* note 88, at 3.

294. LABOR ADVISORY COMM., *supra* note 112, at 10.

295. Polaski, *supra* note 271, at 2.

296. *See id.*; *see Lee, supra* note 261.

297. *See* LABOR ADVISORY COMM., *supra* note 112, at 10; *see Lee, supra* note 261.

298. BOLLE, FREE TRADE AGREEMENTS, *supra* note 231, at 6 tbl.3 (*italics added for emphasis*).

299. *See* Polaski, *supra* note 271, at 3.

300. LABOR ADVISORY COMM., *supra* note 112, at 11.

301. Labor Rights Protections, *supra* note 107, at 9.

302. Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 20.16.2.; *see* Labor Rights Protections, *supra* note 107, at 9.

303. Polaski, *supra* note 271, at 3.

304. *See id.*

litical will to enforce labor laws, resulting in widespread abuse of workers' rights by private employers, as well as the government; and these countries have legal systems that, in the majority of cases, only perpetuate the abuses against workers.³⁰⁵ Even the Deputy USTR Pete Allgeier acknowledged problems within the Central American countries in his testimony before Congress:

And so part of our negotiation is not simply negotiating the obligations, for example, that we have in Singapore and Chile but having a very detailed and concrete dialogue with these countries about the kinds of changes that they would need to make in their labor laws, either in association with this agreement or prior to it . . . So we need to get those, the labor standard and the enforcement of labor rights up to a certain level before we would find acceptable a commitment to enforce those laws.³⁰⁶

But modifications were not made to domestic labor laws in the Central American countries,³⁰⁷ and, in fact, Costa Rica³⁰⁸ and El Salvador introduced laws to weaken workers' rights while negotiating CAFTA-DR.³⁰⁹

Furthermore, CAFTA-DR was not negotiated in compliance with the TPA because labor provisions and dispute settlement procedures from prior free trade agreements remained unchanged when placed into CAFTA-DR, failing to address the real obstacles and situations within the six Central American countries.³¹⁰ The Administration failed to capitalize on its opportunity to affect change in these six Central American countries through stronger labor and dispute settlement procedures in CAFTA-DR, knowing that almost every labor law reform within the past fifteen years in Central America has been due to a direct threat to remove trade benefits under the Generalized System of Preferences (GSP).³¹¹ Furthermore, CAFTA-DR's implementation eliminates the applicability of the GSP, meaning that only CAFTA-DR's labor provisions, allowing labor laws that fall well below ILO standards, will be applicable.³¹²

Therefore, CAFTA-DR allows these six Central American countries to continue along the pathway of sporadic enforcement of labor laws. Thus, the countries fail to meet international standards and are enabled to create new pathways of weakening or reducing existing labor laws and redirecting fines assessed against them for violations of CAFTA-DR's labor provisions into other governmental areas of need.³¹³

305. See, e.g., LABOR ADVISORY COMM., *supra* note 112, at 9; Labor Rights Protections, *supra* note 107; Lee, *supra* note 261.

306. LABOR ADVISORY COMM., *supra* note 112, at 11.

307. See *id.*

308. See Petition to Review Costa Rica, *supra* note 158, at 3.

309. See Petition to Review El Salvador, *supra* note 175, at 6.

310. See, e.g., LABOR ADVISORY COMM., *supra* note 112, at 11; Polaski, *supra* note 271, at 3.

311. See LABOR ADVISORY COMM., *supra* note 112, at 10.

312. See *id.*

313. See *id.*

IV. CAFTA-DR'S PRECEDENT FOR THE FTAA'S LABOR PROVISIONS

The purpose behind the proposed FTAA agreement is that the economies of the thirty-four countries within the Americas, excluding Cuba, may be united into a single free trade area.³¹⁴ If the FTAA is completed, it will be the largest free trade agreement in history.³¹⁵ As of 2004, negotiations were still progressing towards the finalization of the FTAA though it missed the 2005 deadline for completion.³¹⁶

The final draft of the FTAA was done in November of 2003 and is the source used for comparison with CAFTA-DR.³¹⁷ Chapter VII of the FTAA contains labor provisions in almost an identical structure and wording as those within CAFTA-DR.³¹⁸ Article 1 of the FTAA replicates CAFTA-DR's *Statement of Shared Commitment*, stating that the parties recognize and protect within domestic laws internationally recognized labor rights and shall strive to ensure that domestic laws supply labor standards in harmony with internationally recognized labor rights contained within article 7.1.³¹⁹ The FTAA goes on to recite article 16.2 from CAFTA-DR in article 2, asserting that the parties "shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade"; moreover, article 2 repeats that parties acknowledge that it is "inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labor laws."³²⁰

In regards to the dispute settlement procedures, the FTAA combines provisions from CAFTA-DR and the Jordan FTA.³²¹ The included provision from CAFTA-DR limits sanctions to article 2.1, requiring parties to

314. Free Trade Area of the Americas (FTAA), Third Draft, FTAA.TNC/w/133/Rev.3, (Nov. 21, 2003), http://www.ftaa-alca.org/FTAADraft03/Index_e.asp [hereinafter FTAA Draft Agreement].

315. Summits of the Americas, *supra* note 55.

316. *Id.*; Special Summit of the Americas: Declaration of Nuevo León, Jan. 13, 2004, http://www.ftaa-alca.org/Summits/Monterrey/NLeon_e.asp.

317. FTAA Draft Agreement, *supra* note 314, at ch. I.

318. *Compare* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.1 (setting out its labor provisions), *with* FTAA Draft Agreement, *supra* note 314, ch. VII (restating almost identical labor provisions).

319. *Compare* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.1 (setting out a statement of shared commitment), *with* FTAA Draft Agreement, *supra* note 314, ch. VII, art. 1.1 (stating an almost identical commitment).

320. *Compare* Dominican Republic–Central American–United States Free Trade Agreement, *supra* note 103, art. 16.2 (stating enforcement of labor laws), *with* FTAA Draft Agreement, *supra* note 314, ch. VII, art. 2 (replicating the enforcement article within CAFTA-DR).

321. *Compare* Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.4.7 (limiting dispute settlement to art. 16.2.1(a)), *with* FTAA Draft Agreement, *supra* note 314, ch. VII, art. 8 (repeating same limitation as CAFTA-DR). *Compare* Jordan Agreement, *supra* note 245, art. 17, at 18 (allowing a country to resort to any appropriate measure as recourse in the event of a failure to comply with a fine), *with* FTAA Draft Agreement, *supra* note 314, ch. VII, art. 8 (reciting a similar course of action).

enforce its own labor laws.³²² In addition, the FTAA sets the maximum fine a violating party may be assessed at fifteen million dollars annually, which is the same amount within CAFTA-DR.³²³ While the Jordan FTA allows a complaining party to take any appropriate and commensurate measure needed, the FTAA's provision is similar in that if a violating party fails to pay the fine assessed or create an escrow account to ensure payment of the fine, the complaining party "may take other appropriate steps to collect the assessment," which "may include suspending tariff benefits under the Agreement as necessary to collect the assessment".³²⁴ But the complaining party is to bear in mind the FTAA's goal to eliminate barriers to bilateral trade while also trying to avert unduly affecting other parties not involved in the dispute.³²⁵

These drafted labor provisions of the FTAA repeat the same errors and violations as those within CAFTA-DR and the other preceding trade agreements.³²⁶ First, these labor provisions, like CAFTA-DR, fail to meet the negotiating standards required by the TPA that the reality of labor rights within each country be taken into consideration with the final provisions being drafted accordingly.³²⁷ Not taken into consideration is the fact that labor law reform in Central America has only occurred due to the threat of withdrawing trade benefits from the countries if steps were not taken to meet international labor standards.³²⁸ Not taken into consideration is the fact that violations of internationally recognized labor rights are especially prominent in Central America³²⁹ and continue in Mexico in spite of NAFTA.³³⁰ Not taken into consideration is the fact that on paper most of the countries in the Americas have labor laws, some of which meet international labor standards but most of which do not; and these labor laws are, in practice, haphazardly enforced, if they are enforced at all.³³¹ Thus, a provision requiring countries to simply "strive to" enforce domestic labor laws, which are already consistently ignored and do not meet international labor standards, is really requiring

322. Compare Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 16.2.1 (stating enforcement of labor laws by a party), with FTAA Draft Agreement, *supra* note 314, ch. VII, art. 2.1 (replicating the enforcement article within CAFTA-DR).

323. Compare Dominican Republic–Central America–United States Free Trade Agreement, *supra* note 103, art. 20.17.2 (giving fifteen million dollars annually as maximum fine that may be assessed), with FTAA Draft Agreement, *supra* note 314, ch. VII, art. 8.2 (replicating the maximum fine amount from CAFTA-DR).

324. Compare Jordan Agreement, *supra* note 245, art. 17, at 18 (allowing a country to resort to any appropriate measure as recourse in the event of a failure to comply with a fine), with FTAA Draft Agreement, *supra* note 314, ch. VII, art. 8 (reciting a similar course of action).

325. FTAA Draft Agreement, *supra* note 314, ch. VII, art. 8.6.

326. See, e.g., *id.*; Lee, *supra* note 261.

327. See Polaski, *supra* note 271, at 3.

328. LABOR ADVISORY COMM., *supra* note 112, at 10.

329. Pagnattaro, *supra* note 1, at 890.

330. *Id.* at 878.

331. See, e.g., *id.*; LABOR ADVISORY COMM., *supra* note 112, at 10; Polaski, *supra* note 271, at 3.

the countries to enforce the faulty set of labor laws which they already have.³³² If the Administration fails to tailor the labor provisions according to the reality of labor rights within the countries of the Americas, it will allow, if not encourage, violations of internationally recognized labor rights to continue.³³³

Furthermore, the FTAA, like CAFTA-DR, is a step backwards from the Jordan FTA in regards to the dispute resolution procedures.³³⁴ Proving that a country has failed to enforce its national labor laws will be extremely difficult because it has to be shown that the violation was due to "a sustained or recurring course of action or inaction."³³⁵ Additionally, the fact that the dispute resolution procedures are limited solely to the provision regarding labor law enforcement violates the TPA by treating the remaining labor provisions unequally and fails to make enforceable the provision regarding a shared commitment to internationally recognized labor rights.³³⁶ Moreover, the fifteen million dollar fine assessed annually in the event of a violation in CAFTA-DR provided little deterrence, representing only 0.065 percent of the total two-way trade with Central America in 2003, and will provide almost no deterrence, if any at all, in the FTAA considering the immense amount of trade that will be conducted between the parties.³³⁷ The FTAA does provide that a complaining party may take "other appropriate steps" in the event the fine is not paid, but included is an admonition not to forget the objective of the FTAA to eliminate trade barriers and to not unduly affect another party or its interest not involved in the dispute.³³⁸ This additional language appears to warn a complaining party that steps taken which harm either the FTAA objective or another party may lead to the complaining party being subject to claims against it as well.³³⁹

In conclusion, the FTAA is an opportunity for the United States to place labor provisions requiring compliance with international labor standards and providing enforceable protections for internationally recognized labor rights within the largest free trade agreement in history.³⁴⁰ As it stands now, the FTAA falls hopelessly short of this position, leading, at the very least, to continued non-enforcement of labor laws that do not meet international standards, and at worst, to the weakening or elimination of labor laws that are involved in disputes under the FTAA.³⁴¹

332. See LABOR ADVISORY COMM., *supra* note 112, at 10.

333. See, e.g., *id.*; Polaski, *supra* note 271, at 3.

334. See LABOR ADVISORY COMM., *supra* note 112, at 10.

335. See Polaski, *supra* note 271, at 3; FTAA Draft Agreement, *supra* note 314, ch. VII, art. 2.1.

336. See, e.g., LABOR ADVISORY COMM., *supra* note 112, at 11; FTAA Draft Agreement, *supra* note 314, ch. VII, art. 8.1.

337. See LABOR ADVISORY COMM., *supra* note 112, at 12.

338. FTAA Draft Agreement, *supra* note 314, ch. VII, art. 8.6.

339. *Id.*

340. Summits of the Americas, *supra* note 55.

341. See LABOR ADVISORY COMM., *supra* note 112, at 10-11.

V. CONCLUSION

CAFTA-DR was presented as a vehicle to advance U.S. commercial interests, as well as, spread stability and security within the Americas.³⁴² Realizing that the economic impact is relatively small, President Bush pushed the agreement as “a commitment of freedom-loving nations to advance peace and prosperity throughout the Western Hemisphere.”³⁴³ But CAFTA-DR does not advance peace or prosperity in the six Central American countries that are parties to it because CAFTA-DR does not act as an avenue for advancing workers’ rights and requiring compliance with international labor standards.³⁴⁴

CAFTA-DR fails to address the continuous, egregious manner in which workers’ rights are violated in the six Central American parties. It also fails to provide any meaningful mechanism of enforcement for the labor rights that it claims to recognize and uphold.³⁴⁵ The Central American parties to CAFTA-DR lack the political will to enforce the standard labor laws they have, much less the political will to push for labor laws meeting the exacting standards of the international community.³⁴⁶ Change in Central American labor laws has only come about as a result of international pressure, and the United States failed to capitalize on its opportunity to place pressure on these six countries to change with CAFTA-DR’s labor provisions.³⁴⁷

In conclusion, CAFTA-DR’s labor provisions fall incredibly short of meeting the obligations within the TPA and those set out by the ILO and international community.³⁴⁸ Therefore, the United States should not fail to recognize the opportunity it has with the FTAA to correct the unfortunate errors made in CAFTA-DR’s labor provisions. In capitalizing on this opportunity, the United States should make sure that the FTAA provides enforceable labor provisions requiring compliance with internationally recognized labor rights and standards, stopping a race to the bottom by governments and employers, and adhering to the domestic and international obligations which obligate the United States to uphold and protect international labor rights.

342. Vieth, *supra* note 64.

343. *Id.*

344. *See, e.g., id.*; LABOR ADVISORY COMM., *supra* note 112, at 10-11.

345. *See, e.g.,* LABOR ADVISORY COMM., *supra* note 112, at 11; Polaski, *supra* note 271, at 3.

346. *See, e.g.,* LABOR ADVISORY COMM., *supra* note 112, at 9; Labor Rights Protections, *supra* note 107; Lee, *supra* note 261.

347. *See* LABOR ADVISORY COMM., *supra* note 112, at 10.

348. *See id.* at 9, 13.

